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Supreme Court, U.S.
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No. 05-107

IN THE

# Supreme Court of the United States

WARREN DAVIS,

*Petitioner,*

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), UAW REGION 2B, RONALD GETTELFINGER, and LLOYD MAHAFFEY,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## REPLY TO BRIEF IN OPPOSITION

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The petition for a writ of certiorari seeks this Court's review of two main questions, the first of which has two subparts. The first question, about the appealability of remand orders, presents the Court with an opportunity to address a problem whose existence respondents do not dispute – that the "narrow exception" to the non-appealability command of 28 U.S.C. § 1447(d), first created by this Court in *Thermtron Prod. v. Hermansdorfer,* 423 U.S. 336 (1976), has been so expanded by the lower courts that it has swallowed the rule. This expansion of *Thermtron*'s narrow exception has manifested itself in several ways. First and most important, there is a particularly serious disagreement among the circuits about whether a court of appeals must accept a district judge's characterization of his remand as being based on lack of jurisdiction. Second, many remand decisions are now subject to review because several circuits have decided that remands under the authority of 28 U.S.C. § 1367(c) are subject to appellate review simply because they are not remands under 28 U.S.C. § 1447(c), even though some other non-1447(c) remand decisions are generally accepted as being non-reviewable.

In their opposition to the petition, respondents attempt to nibble away at some of the subparts of this question; this Reply responds to those discrete points. But respondents never address the larger problem of which the individual questions are a manifestation. The Court should grant review in this case, as the petition argues, to restore the vitality of section 1447(d)'s command, and to ensure that the *Thermtron* exception once again becomes an exception, and not the rule.

1. The petition showed that there is broad disagreement among the circuits about whether reviewability of a remand order may be based on an appellate court's second-guessing of the trial judge's characterization of his reasons for remanding as being based on "lack of jurisdiction." The Third and Fifth Circuits have held that use of the term "jurisdiction" is the end

of the matter, and must be taken at face value, while the Tenth Circuits accepts such a characterization so long as the district judge has acted in good faith. The Fourth, Sixth and Eighth Circuit have squarely held that the district judge's reasoning must support the characterization of the remand as jurisdictional, while the Seventh Circuit has accused the Second and Ninth Circuits of being improperly "mesmerized" by the word "jurisdiction." Pet. at 13. This issue is squarely presented in this case and the Court should grant certiorari to resolve the conflict about it.

Respondents claim that the petition "overstates the conflict," Opp. at 10, but their only evidence in support of that proposition is the following conclusory assertion, coupled with a single citation: "However, most of the opposing circuits [that disagree with the strict 'stated reason' approach] are similarly 'strict' in their interpretative approach. *See, e.g.*, *Rubel v. Pfizer, Inc.*, 361 F.3d 1016, 1020 (7th Cir. 2004) ('If the judgment is one remanding for lack of jurisdiction, the reasoning in the opinion is not independently reviewable.')." Opp. at 10. Respondents do not even attempt to show the absence of a circuit split involving the Fourth, Sixth and Eighth Circuits.

The *Rubel* citation does not even show that the Seventh Circuit stands apart from the division in the circuits. The quoted language is at best ambiguous about whether the Seventh Circuit will review to determine whether the reason given below is, in fact, jurisdictional. The next sentence in *Rubel* expresses uncertainty about whether that court would join the Tenth Circuit in reviewing the trial judge's adoption of jurisdictional reasoning for bad faith. Moreover, *Rubel* was decided more than three months **before** *Karcher v. Putnam Funds Trust*, 373 F.3d 847 (7th Cir. 2004), the Seventh Circuit

case cited in the petition.

Instead, respondents emphasize that the decision below is consistent with the "strict" stated reasons approach, but their argument is faulty. The district court repeatedly characterized its reason for remanding as being lack of jurisdiction through preemption. Pet. App. 13a-14a ("Given that the Court concludes that it **does not have jurisdiction** over the case"), 30a ("The Court concludes that the nature of the relief requested by Davis, alone, **does not create federal preemption jurisdiction**"); 32a ("neither the LMRDA nor LMRA preempt Davis's state law claims. Accordingly, the defendants' **removal** of this case to this Court **was not well-taken**") (emphasis added in all quotations). To be sure, **if** there had been a post-removal event that eliminated a claim which, at the time of removal, conferred subject matter jurisdiction on the trial court, then the trial judge's assertions that the court lacked jurisdiction due to complete preemption would be wrong. Similarly debatable is the trial judge's statement that Davis' relinquishment of the reinstatement claim avoided any need to decide whether the reinstatement claim was completely preempted, and thus whether that claim created a basis for removal in the first instance. After all, **if** the eliminated claim was completely preempted and hence removable, then the district court would have had pendent jurisdiction over the remaining claims under 28 U.S.C. § 1367, and the remand would not have been required but rather discretionary under section 1367(c). However, any error in the district court's reasoning would not be a reason to recognize **appellate** jurisdiction unless the view of the Fourth, Sixth and Eighth

Circuits on this question is correct.[1] Thus, the first issue, on which the circuits are sharply divided, is squarely presented in this case, and the Court should grant review to consider it.

2. The petition also urges the Court to grant review to decide whether discretionary remand decisions authorized by 28 U.S.C. § 1367(c) could be reviewed in the courts of appeals. The petition acknowledges that there is no division among the courts of appeals directly on this point, but notes first that the question remains open in this Court – indeed, Justices Kennedy and Ginsburg flagged the fact that it remains open, Pet. at 10 – and, second, that the circuits **are** divided in their analysis of closely related points – whether remand decisions authorized by 1445(a) and 1447(e) are subject to appellate review. Pet. 17-18. Respondents argue that reference to these other divisions among the circuits is a "non sequitur," Opp. 14, because the refusal to allow appellate review of these remand decisions may well be justified for reasons consistent with *Thermtron*. But the same reasons for barring appellate review of these other remand orders – that the remands were based on Congressionally authorized grounds – also apply to section

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[1] In any event, all parties agreed in their appellate briefs that the district court erred when it asserted that petitioner relinquished his claim for reinstatement. Indeed, respondents based their argument below for complete preemption on the contention that the claim had never been eliminated. Brief of Defendants-Appellants, at 38. The court of appeals, for its part, noted that the district court "may have been mistaken" in this respect. Pet. App. 7a. In this Court, respondents bury their acknowledgment of this point in a footnote, Opp. at 6 n.2, without acknowledging that the fact that no claim was ever relinquished bars their contention that there was a post-removal event that could have afforded a basis for pendent jurisdiction.

1367(c) remands if what *Thermtron* is about is reining in judges who remand to state courts for reasons that they invent unrelated to standards established by Congress. If that is the purpose of the *Thermtron* exception, then a judge who invokes the remand authority afforded by section 1367(c) should also be immune from appellate scrutiny even if his reasoning is wrong. On the other hand, if the gist of *Thermtron* is to limit section 1447(d) to remands enumerated by section 1447(c), then remands authorized by any other statute should be subject to appellate review, and the circuits barring review of section 1445 and section 1447(c) remands are reading section 1447(d) too broadly. Thus, the fact that lower courts have generally agreed regarding appellate review of section 1367(c) remands should not bar review because their reasoning in this regard conflicts with some circuits' reasoning about review of other remands under section 1447(d) and *Thermtron*.

3. Finally, the petition seeks review of the ruling below on the issue of removal based on complete preemption, contending that complete preemption can be provided only by a federal statute that creates a private right of action that the plaintiff could have filed in federal court, and thus could displace the state cause of action with a federal one. There is growing disagreement among the courts of appeals about whether, as respondent argues, the mere existence of a "federal remedy," Opp. 16, including the right to file an administrative complaint, is a sufficient basis for complete preemption.

Respondents do not deny that there is a broad split in the circuits on that question, but contend only that petitioner failed to preserve the issue below and that the Sixth Circuit was correct. However, petitioner has consistently argued from the outset of this case that the LMRDA does not completely preempt his state law claims. At most, then, petitioner is

simply making a new argument in support of his properly preserved claim in the lower courts. *See Harris Trust v. Salomon Smith Barney*, 530 U.S. 238, 245 n.2 (2000) (petitioners may advance new argument in support of claims preserved below); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (same); *Yee v City of Escondido*, 503 U.S. 519, 535 (1992) (same). Moreover, the issue of preemption removal is to some extent antecedent to the issue of appellate jurisdiction, because the court of appeals' appealability determination was based on its assumption that a claim for reinstatement to petitioner's original position within the union was itself sufficient to render the complaint removable, so that its elimination from the case was a relevant "post-removal event" supplying pendent jurisdiction over the remaining claims. See *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (addressing statutory question that was "'predicate to an intelligent resolution' of the question presented," even though it was not raised below).

After this Court expanded the narrow "complete preemption" exception to the general rule that the presence of a federal law defense to a state law claim does not transform the state claim into a removable federal claim, by applying it to ERISA in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 67 (1987), lower courts misconstrued the decision as authorizing removal jurisdiction based on preemption by many additional federal statutes, and the Court had to decide several additional cases to ensure that the complete preemption exception did not swallow the general rule. *E.g.*, *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838 (1989); *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998). As the petition demonstrates, the phenomenon of over-reaction is manifesting itself once more, and the sooner the Court reaffirms the vitality of the general rule, the less damage will be done to the sovereignty of

the states whose courts are deprived of the right to decide cases properly brought there, including the resolution of federal preemption defenses that may be interposed in such cases.

Many federal statutes create administrative remedies of one kind or another, and then enable federal agencies to go to court to enforce their decisions. If respondent is correct that the mere existence of a "federal remedy" is a sufficient basis for complete preemption, then the complete preemption exception will swallow the general rule that, absent diversity, preemption defenses must be litigated in state court and do not afford a basis for removal. For example, a case like *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (1986), would be removable if the defendant asserted that the Food Drug and Cosmetic Act preempted the plaintiff's tort claims. *But see id.* at 816 (preemption argument based on conflict between FDCA regime and state-court jurisdiction over claims that FDA standards were violated is not ground for removal where Congress did not provide private right of action to enforce FDCA).

As the petition shows, numerous decisions have begun to appear that threaten to obliterate the distinction between non-removable preemption defenses and completely preempted state claims. Review on this question presented is needed to push the genie of complete preemption removal back into the bottle.[2]

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[2]Respondent asserts that petitioner "does not deny that the indisputably federal questions of whether Davis was elected and whether the defendants eliminated Davis' position" have to be resolved to decide Davis' state law claims. Opp. 15. Petitioner does deny both that these are legal questions that turn on federal law, and that they need to be decided in order to address each of the state law claims. Petitioner also denies, of course, that these arguments are a

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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proper predicate for removal on the basis of complete preemption.